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No. 79-979

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLAMETTE IRON AND STEEL COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 604 F. 2d 1177. The opinion of the Occupational Safety and Health Review Commission (Pet. App. 7-11) is reported at 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,482. The opinion of the administrative law judge (Pet. App. 12-22) is summarized at 1976-1977 Occup. Safety & Health Dec. (CCH) para. 20,702.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1979, and a petition for rehearing was denied on September 26, 1979 (Pet. App. 6). The petition for a

writ of certiorari was filed on December 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision of the Occupational Safety and Health Review Commission, supported by the votes of two Commissioners, to affirm a decision of an administrative law judge but to give the affirmance the precedential value of an unreviewed administrative law judge's decision is a final "official action" by the Commission within the meaning of 29 U.S.C. 661(e).

2. Whether, in the circumstances of this case, petitioner's violation of a safety standard was "repeated" within the meaning of 29 U.S.C. 666(a).

STATEMENT

Petitioner maintains a worksite at the Swan Island Ship Repair Yard in Portland, Oregon, where it employs a regular work force to repair incoming vessels throughout the year (Pet. App. 12). On December 8, 1972, the Secretary of Labor cited petitioner for a violation of a safety standard issued under the Occupational Safety and Health Act of 1970 occurring at this site during the repair of the vessel NAECO. The citation, issued pursuant to 29 U.S.C. 658(a), alleged that petitioner allowed exposed hoses and welding leads on the vessel's weatherdeck, in violation of the Secretary's standard requiring employers to maintain good housekeeping conditions and to keep working surfaces clear of hoses and electrical conductors. See 29 C.F.R. 1915.51(a). When petitioner failed to contest the citation within 15 days, it became a final order of the Occupational Safety and Health Review Commission not subject to further review (Pet. App. 8, 14; 29 U.S.C. 659(a)).

Some 34 months later, in September 1975, a Department of Labor inspector conducted a routine inspection of petitioner's facility and discovered numerous instances of petitioner's failure to comply with the same safety standard. Aboard the vessel NEW YORKER, the inspector observed 12 separate areas where the walking and working surfaces for employees were cluttered with hoses, welding leads, electrical cords and other material (Pet. App. 8, 13). It was undisputed that these conditions existed in areas where the same labor crafts had worked on the vessel NAECO in 1972 and that the same management supervisors had worked on both ships (Pet. App. 8, 16).

The Secretary subsequently issued a citation alleging that the conditions on the NEW YORKER violated 29 C.F.R. 1915.51(a) and that the violation was "repeated" within the meaning of 29 U.S.C. 666(a), which authorizes assessment of increased penalties for such violations. The Secretary proposed a penalty of $1,560. Petitioner contested the citation, and the matter was submitted to an administrative law judge of the Occupational Safety and Health Review Commission on stipulated facts (Pet. App. 12-13). In the stipulation (Pet. App. 13-15), petitioner admitted that the violation had occurred but denied that it was "repeated." The Secretary thereafter reduced his proposed penalty to $780, and the parties agreed that $200 would be an appropriate penalty if the judge were to find that the violation was not a "repeated" one. See 29 U.S.C. 666(c), (j).

The administrative law judge found a "repeated" violation. He concluded that the existence of the same tripping hazards created by the same types of material, hoses and welding leads, during work performed at the same repair facility by the same labor crafts under the

same management supervision in admitted violation of the same safety standard was sufficient evidence to justify the classification of the violation as "repeated," despite the lapse of time between inspections (Pet. App. 16-17). In the judge's view, the fact that the violation occurred under the same management supervision gave rise to an inference, unrebutted by petitioner, that petitioner had not taken sufficient measures to prevent a repetition of conduct known to be in violation of the Act (*id.* at 17). However, the judge reduced the proposed penalty to $400 in a decision dated April 12, 1976 (*id.* at 18-19).

Pursuant to 29 U.S.C. 661(i), Commissioner Moran of the Occupational Safety and Health Review Commission directed review of the administrative law judge's decision on April 15, 1976, before either party had requested review. Both petitioner and the Secretary of Labor then petitioned for review. Petitioner contested the finding of a "repeated" violation, and the Secretary contested the reduction of the penalty assessment. Commissioner Cleary granted the petitions of both parties on May 12, 1976. The term of Commissioner Moran expired on April 27, 1977, before the Commission issued a decision in the case. This vacancy remained unfilled until May 1, 1978.

On January 11, 1978, the Commission, reduced to two members, disposed of this case. The two Commissioners agreed that a violation had occurred and that a $200 penalty was appropriate, and they jointly rejected several statutory objections to the citation and declined to reach certain constitutional objections (Pet. App. 7, 10-11). The Commissioners disagreed, however, on whether the violation was properly classified as "repeated" (*id.* at 7-11). To resolve their impasse on this question, the Commissioners agreed to affirm the administrative law judge's decision that the violation was "repeated," but to

accord it the precedential value of an administrative law judge's decision that the Commission had declined to review (*id.* at 7, 11).

Petitioner sought judicial review of this order in the court of appeals pursuant to 29 U.S.C. 660(a). The court dismissed the petition for review for lack of jurisdiction, concluding that the Commission's order affirming the decision of the administrative law judge was not a reviewable "official action" by the Commission within the meaning of 29 U.S.C. 661(e)[1] because the Commissioners did not, in fact, agree on whether the violation was "repeated" (Pet. App. 3-4). The court largely relied on its previous decision in *Cox Brothers, Inc.* v. *Secretary of Labor*, 574 F. 2d 465 (9th Cir. 1978), in which it had concluded that an affirmance of an administrative law judge's decision by an equally divided vote of two Commissioners was not "official action" under Section 661(e) because the requisite two Commissioners did not join in the disposition. The court rejected the argument that the present case was distinguishable from *Cox Brothers* because both members here had voted to affirm (albeit without according the affirmance the precedential weight of a Commission decision), whereas in *Cox Brothers* only one of the two members of the "equally divided" Commission had actually voted to sustain the administrative law

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[1] 29 U.S.C. 661(e) provides:

> For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

judge's decision. The court remarked (Pet. App. 4; emphasis in original):

> The Commission cannot have it both ways. Either it affirms the hearing officer's decision and the Commission's ruling has the precedential value of a *Commission ruling*, or the Commission has not officially affirmed the hearing officer's decision. In both *Cox Brothers* and this case, the hearing officer's decision is left as the only authoritative disposition.

Because the court of appeals dismissed the petition for lack of jurisdiction, it did not address the question whether the violation in this case was "repeated" within the meaning of 29 U.S.C. 666(a).

ARGUMENT

1. As petitioner points out (Pet. 5), there is a conflict among the circuits as to whether a court of appeals has jurisdiction to review a decision of the Occupational Safety and Health Review Commission that results from a split vote of two Commissioners affirming a decision by an administrative law judge. In addition to the decisions by the Ninth Circuit in the present case and in *Cox Brothers*, the Fifth Circuit has held that an affirmance by the equally divided vote of a two-member quorum does not constitute "official action" of the Commission giving rise to a reviewable order. *Shaw Construction, Inc.* v. *OSHRC*, 534 F. 2d 1183, 1185-1186 (1976). The Fourth Circuit has rejected this reasoning in the context of a three-way split and a two-way split of the Commission members. *Bristol Steel & Iron Works, Inc.* v. *OSHRC*, 601 F. 2d 717, 720 n.7 (1979); *George Hyman Construction Co.* v. *OSHRC*, 582 F. 2d 834 (1978). In addition, the Second, Third, Sixth, Seventh and Eighth Circuits have reviewed orders affirmed by a one-to-one vote of the Commission without questioning their finality or validity.

See *Schriber Sheet Metal & Roofers, Inc.* v. *OSHRC*, 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,423 (1977), vacated on other grounds, 597 F. 2d 78 (6th Cir. 1979); *Marshall* v. *L. E. Myers Co.*, 589 F. 2d 270 (7th Cir. 1978); *Bethlehem Steel Corp.* v. *OSHRC*, 573 F. 2d 157 (3d Cir. 1978); *Olin Construction Co.* v. *OSHRC*, 1974-1975 Occup. Safety & Health Dec. (CCH) para. 19,853 (1975), affirmed, 538 F. 2d 312 (2d Cir. 1976); (table) *United States Steel Corp.* v. *OSHRC*, 537 F. 2d 780 (3d Cir. 1976); *Ames Crane & Rental Service, Inc.* v. *Dunlop*, 532 F. 2d 123 (8th Cir. 1976).

Whatever the proper resolution of this conflict in a case involving an affirmance by an equally divided vote, we believe that the court of appeals erred on the facts of this case. Although Commissioners Cleary and Barnako held differing views on whether petitioner's violation was "repeated," the Commission's formal order, in which both Commissioners joined, unequivocally affirmed the holding of the administrative law judge that the violation was repeated and imposed a penalty of $200 (Pet. App. 11). In our view, this order plainly qualifies as "official action," taken "on the affirmative vote of * * * two members" of the Commission (29 U.S.C. 661(e)), even though the two members agreed to accord the decision the precedential value only of an unreviewed decision by an administrative law judge (Pet. App. 7). Hence, the order was reviewable in the court of appeals under 29 U.S.C. 660(a).

The court below improperly looked behind the Commission's order, which was valid on its face, in determining that "the 'dissenting' commissioner did not truly vote to affirm" (Pet. App. 5). Cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (the role of an appellate court "is to correct wrong judgments, not to revise opinions").

It is entirely appropriate for a member of an independent regulatory commission to vote in a certain way solely to avoid an impasse. *Public Service Commission* v. *FPC*, 543 F. 2d 757, 777 (D.C. Cir. 1974); cf. *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring). Furthermore, the Commission had the discretion to determine, as have the courts of appeals for the Ninth and several other circuits,[2] that its affirmance, while binding on the parties to this case, would have no precedential value in future cases.

Despite our conclusion that the decision below is incorrect, we do not believe that the jurisdictional issue warrants review by the Court at this time. As noted above, the vacancy that gave rise to the problem in this case was filled in May of 1978, and the Commission since then has had its full complement of three members.[3] Because this problem may recur in the future, the Commission is now exploring ways to dispose equitably of cases in which the votes of individual Commissioners are equally divided. Moreover, in view of the court of appeals' decision, the Commission, now comprised of

[2]See, *e.g.*, 1st Cir. R. 14 and Appendix B; 2d Cir. R. 0.23; 7th Cir. R. 35; 9th Cir. R. 21(c).

[3]The Commission informs us that its research has disclosed that approximately 18 cases were decided by a split vote of the two Commissioners during the period of the vacancy involved in this case, and 32 were decided during a prior vacancy in 1975-1976. Review was sought in the courts of appeals in approximately 20 of these 50 cases. The Ninth Circuit dismissed three of these cases (including the instant case and *Cox Brothers*), and the Commission has not taken any further action on them. Review was sought in the Fifth Circuit in two cases, including *Shaw Construction, Inc., supra*. The Commission subsequently disposed of *Shaw Construction, Inc.* by a 2-0 vote, but no action has been taken on the other Fifth Circuit case.

three members, intends to take appropriate "official action" in this case.

Because the court of appeals dismissed for lack of jurisdiction, it did not reach the merits of whether petitioner's violation was a "repeated" one under 29 U.S.C. 666(a). Without the benefit of the views of the full Commission or the court of appeals, this issue plainly does not warrant review by the Court at this stage of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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